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No. 108, Original

In the Supreme Court of the United States

OCTOBER TERM, 1986

Before the Honorable Owen Olpin
Special Master

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF OF AMICUS CURIAE PLATTE RIVER TRUST IN SUPPORT OF NEBRASKA'S AMENDED PETITION FOR APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

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STATEMENT OF THE CASE

This proceeding involves a dispute between Wyoming, Nebraska, and Colorado over water rights in the North Platte River and its tributaries. In 1945, the United States Supreme Court apportioned the irrigation-season natural flows of this river system and restricted their

future use.[1] *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The Court retained jurisdiction to modify the Decree as warranted by changed circumstances or for "further relief." *Id.* at 655.

On October 6, 1986, the State of Nebraska petitioned the Court to enjoin certain upstream projects proposed by the State of Wyoming. The Court appointed a Special Master and on September 11, 1987, Wyoming filed a motion for summary judgment. The Platte River Whooping Crane Critical Habitat Maintenance Trust ("the Platte River Trust") was granted amicus curiae status on April 1, 1988 and on March 2, 1989 the Special Master denied Wyoming's motion for summary judgment. Thereafter, Wyoming and Nebraska filed cross-motions for summary judgment. Those motions, as well as the Trust's motion for a more active litigation role or reconsideration of the issue of its intervention are currently pending before the Special Master. On March 13, 1991, the State of Nebraska requested that the Special Master recommend an apportionment of the *non-irrigation* season natural flows of the North Platte River. The Trust supported Nebraska's motion. The Special Master denied Nebraska's motion, and suggested that the request for a recommendation should instead be submitted to the Supreme Court as an amended petition.

On October 9, 1991 Nebraska filed her motion with this Court for leave to file an amended petition for an appropriation of non-irrigation season flows, which included a request for the assertion of new claims, as well as a brief in support ("Nebraska Amended Petition"

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[1] The Court's decree imposing the water-use restrictions is reported at *Nebraska v. Wyoming*, 325 U.S. 665 (1945). The Court modified the decree in 1953 upon joint stipulation of the parties. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

and "Nebraska Brief"). The Trust respectfully submits the following memorandum in support of that motion.

The non-irrigation season flows are closely connected to the irrigation season flows. Realistically, the distinction between the two flows is now obsolete. Equities in Nebraska such as recreation, irrigation, hydropower, and the survival of fish and wildlife -- including federally protected endangered species -- rely to a substantial extent upon non-irrigation season flows for their continued viability. Without an apportionment of non-irrigation season flows, Wyoming's proposed projects will threaten the existence of these equities.

Paramount among those equities is the federally-protected "critical habitat" and other wildlife habitat areas in central Nebraska. In particular, "[t]he banks of the Platte River * * * are home to a number of endangered species of wildlife, including the whooping crane."[2] *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 110 (D.C. Cir. 1989). In addition, the Platte River provides essential roosting or nesting habitat for hundreds of other avian species (resident and migratory), including the endangered Bald Eagle, Least Tern, Peregrine Falcon, Eskimo Curlew, and the threatened Piping Plover.[3] *P. Currier, G. Lingle & J. VanDerwalker, Migratory Bird Habitat On The Platte and North Platte Rivers in Nebraska ("Migratory Bird Habitat")*, 1985 at 4; *see also* 50

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[2] An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." *Endangered Species Act, 16 U.S.C. § 1532(6) (1989).*

[3] A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *16 U.S.C. § 1532(20).*

FERC ¶ 61,180 at 61,525 (1990).[4] In fact, at least 300 species of birds migrate annually through the Platte and North Platte River Valleys. *Platte River Trust Unpublished Data*. "[H]undreds of thousands of Sandhill Cranes and millions of ducks and geese of many species, funnelling from vast areas, converge on this unique river and its environs during their long northward migration in spring." C. Safina, et al., *Threats to Wildlife and the Platte River ("Threats to Wildlife")*, 1989 at 1.

In an attempt to protect the habitat of these birds and to promote their survival, the federal government has designated certain protected areas. For example, the Department of the Interior has designated the 53-mile-long Big Bend reach of the Platte River (from Lexington to Kearney in central Nebraska) a "critical habitat" for the whooping crane.[5] 43 Fed.Reg. 20,938-42 (1978). The Department has also designated two areas of the Platte River as "Resource Category 1" habitat for Sandhill Cranes and Greater White-fronted Geese, acknowledging that habitat to be "unique and irreplaceable."

The wildlife habitat along the Platte River in central Nebraska is generally recognized as a unique and invaluable natural resource of international importance. The rapid loss of habitat throughout the range of many

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[4] The endangered Prairie White-Fringed Orchid also occurs on the riparian meadows that are sub-irrigated by the Platte River.

[5] Critical habitats are defined as "the specific areas within the geographical area occupied by the species * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection."
16 U.S.C. § 1532(5)(A)(i).

of the migratory avian species that use the Platte River amplifies its importance. *Threats to Wildlife* at 10. The Platte River is a particularly suitable habitat for many species because of its channel morphology, that is, its physical characteristics, as well as its instream flow regime.[6] In its pre-development state, the Platte River exhibited a relatively steep riverbed slope, periodic movement of large quantities of sediment, a dramatic seasonal variance in the volume of instream flows, unstable banks, and constantly migrating sandbars. The interplay of these characteristics created a wide "braided" river, laced with unvegetated sandbars -- the essential components of roosting habitat for whooping cranes. In addition, the river afforded cranes wide expanses of sub-irrigated marshes, sloughs, and wetland sedge meadows adjacent to the river channel for feeding habitat. Least terns and piping plovers once nested on large, barren sandbars exposed by the low flows characteristic of the summer season. Terns fed on fish from nearby channels, while Plovers fed on invertebrates from sandbars and mudflats. Over-wintering eagles fed on fish from the river. *See Threats to Wildlife, supra*, at 10-26.

Only a few reaches of the Platte River currently retain these habitat characteristics. Upstream consumptive use of the natural flow of the North Platte system -- in both the irrigation and non-irrigation season -- has significantly altered the character of the Platte River and the habitat it can offer wildlife. The Platte River channel has lost many of its natural contours as inflows have decreased and the natural (seasonal) variance in flow levels has been disrupted. In some reaches, the

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[6] The National Audubon Society discusses the habitat features of the Platte River in detail in its brief on the pending cross-motions for summary judgment. *Audubon Brief* at 8-16; *see also Threats to Wildlife, supra*, at 10-26, 39-62.

Platte River channel has become narrow and deep with large trees growing on former sandbars and along its banks.[7] Some reaches of the Platte River have suffered a total loss of roosting habitat, causing cranes and other species to abandon entire portions of the river. Overall, the Platte River Trust estimates that at least 80 percent of the historic roosting habitat in central Nebraska has been lost. In the "best" reaches less than 50 percent of the original roosting habitat remains. Accordingly, any further reduction in flows by Wyoming will exacerbate those losses and seriously jeopardize the continued existence of the endangered and threatened species dependent upon the Platte River habitat.

Proceedings before the Federal Energy Regulatory Commission ("the Commission") to re-license the Kingsley/Keystone power projects in Nebraska (upstream of the Critical Habitat and other habitat areas) confirm the adverse effect of reduced flows. Following several months of proceedings and voluminous record submissions, the Commission concluded that critical aspects of the Platte River habitat system are degrading, seriously impeding the recovery of federally-

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[7] In 1981, the U.S. Fish and Wildlife Service observed that: "[w]ith approximately 70 percent of the Platte's annual flows diverted for various consumptive uses upstream in Colorado, Wyoming, and western Nebraska, channel width in many areas has been reduced to 10-20 percent of former size. Habitat conditions within the existing channel have also changed as a result of reduced scouring of sandbars and shifting of alluvial sediments. A broad band of mature deciduous woodland now occupies tens of thousands of acres that formerly were part of the river and numerous islands overgrown with woody vegetation exist within the channel." *The Platte River Ecology Study, Spec. Rept. Northern Prairie Wildlife Research Center*, 1981 at i.

protected species and jeopardizing the river's viability as a wildlife habitat.[8] 50 FERC ¶ 61,180 at 61,532 (1990).

The Commission held that in light of the immediate threat to the habitat, "the facts of this case warrant the extraordinary remedy of amending the annual licenses to include interim [instream flow] measures to protect the Platte River habitat" from "potential irreversible environmental damage pending re-licensing." *Id.* at 61,524. However, despite its holding, the Commission was persuaded that the annual license amendment jeopardized irrigation needs, and subsequently stayed enforcement of the emergency instream flow measures. All parties continue to strenuously disagree about the best ways to balance the needs of competing uses with the available water supply.

Unfortunately, the Commission's fears of irreversible harm may well have been realized. In the past 14 months, 19 endangered whooping cranes have perished. The whooping crane population numbered only 135 at the onset of this past spring's migration; having decreased from 142 birds in the spring of 1990. The loss of such proportions, to the only naturally-breeding flock of whooping cranes remaining in the world, is staggering. It is the greatest single loss of whooping cranes in the five decades of record.

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[8] The Commission held those proceedings on remand from an order of the U.S. Court of Appeals for the District of Columbia finding the Commission "irresponsible" for having "ignore[d] * * * expert' opinion and refus[ing] even to conduct a preliminary investigation into this [habitat] threat and the availability of interim measures to combat it." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 117 (D.C. Cir. 1989).

ARGUMENT

The Platte River Trust supports Nebraska's motion for leave to file an amended petition for an apportionment of non-irrigation season flows and for the assertion of new claims. In comparison to those irrigation season flows that are contested by Wyoming, non-irrigation season flows constitute a larger component of the water issue. Resolving the entire apportionment dispute will necessarily require apportioning non-irrigation season flows. For example, the needs of the habitat are annual rather than seasonal, depending in significant part on non-irrigation season flows. Enforcing the Decree as to irrigation season flows alone will not prevent irreversible injury to the habitat. Indeed, several endangered or threatened species (and hundreds of resident and migratory avian species) depend heavily upon non-irrigation season flows to preserve the vestiges of Platte River habitat in central Nebraska.

The Platte River habitat constitutes an important environmental "equity" within the scope of the equitable apportionment doctrine. Wyoming's proposed projects and the United States' recent actions, will cause further upstream depletions and threaten serious injury to the habitat, invoking the Court's jurisdiction under the 1945 Decree and its original jurisdiction to resolve interstate disputes over water allocation. The Court must, therefore, fashion an apportionment of non-irrigation season flows in order to ensure compliance with the 1945 Decree and protection to the equities in Nebraska.

A. The Decree and The Doctrine of Equitable Apportionment Allow This Court To Invoke Its Original Jurisdiction Over The State Of Nebraska's Amended Petition

In 1945, when the Supreme Court issued its Decree equitably apportioning the waters of the North Platte River among Colorado, Wyoming and Nebraska, it recognized the need for flexible administration and enforcement of the provisions of its Decree. *Nebraska v. Wyoming*, 325 U.S. 589, 616-617 (1945). Anticipating a possible charge in factual circumstances, the Supreme Court retained jurisdiction over the matter, 325 U.S. at 655, finding that "[t]he Decree will not necessarily be for all time. Provision will be made for its adjustment to meet substantially changed conditions." 325 U.S. at 623. In fact, Article XIII of the Decree expressly provides:

> Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the Decree, or any supplementary Decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> (f) Any change in conditions making modification of the Decree or the granting of further relief necessary or appropriate.

In accordance with Article XIII, Nebraska's petition is clearly related to the "subject matter in controversy", namely, the equitable apportionment of the waters of the North Platte River among Colorado, Wyoming and Nebraska. As we will demonstrate below, the Court cannot reach a comprehensive solution to the appropriation dispute without addressing the apportionment of non-irrigation season flows. Moreover, in the absence of an equitable apportionment of non-irrigation season flows, the established equitable uses of irrigation, hydropower, recreation, fish and wildlife will be jeopardized. In 1936 and 1945 the parties were unaware of the needs of the downstream equities, particularly those of recreation and wildlife. The newly recognized jeopardy to these uses -- particularly to the endangered species that rely upon the critical habitat -- constitutes a "change in conditions" that makes the modification of the Decree or the granting of further relief necessary and appropriate. Accordingly, this Court must invoke Article XIII to modify and supplement the Decree to include an apportionment of non-irrigation season flows and to permit Nebraska's additional claims.

Furthermore, there is no question that Nebraska's amended petition presents a justiciable "case or controversy" regarding equitable apportionment of non-irrigation season flows invoking this Court's original jurisdiction. U.S. Const. Art. III, § 2.[9] *See Nebraska Brief* at 12-13. This Court considers a dispute a "controversy" for purposes of its original jurisdiction where the complaining state "is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the

[9] The Trust also agrees with Nebraska's assertion that she is not a "nominal party", representing only private interests. *See Nebraska Brief* at 12.

common law or equity systems of jurisprudence." *Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981)(quoting *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)). Moreover, it is well established that:

> whenever * * * the action of one State reaches, through the agency of natural laws, into the territory of another State, the question of the extent and the limitations of the rights of the two states become a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

Kansas v. Colorado, 206 U.S. 46, 97-98 (1907). Accordingly, "[t]here is no doubt that this Court's jurisdiction to resolve controversies between two States * * * extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows" *Texas v. New Mexico*, 462 U.S. 554, 567 (1983).

This is particularly true, where, as here, the controversy concerns a fully appropriated river. *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945). Here, Nebraska -- which shares the North Platte River with two other States -- seeks an equitable apportionment of non-irrigation season flows in order to protect the established equities within its borders whose continued survival depends upon those flows. Nebraska's request for an equitable apportionment, therefore, invokes this Court's jurisdiction under both the 1945 Decree and the U.S. Constitution.

Nebraska's Amended Petition requests an equitable apportionment of non-irrigation season flows. An equitable apportionment of non-irrigation season flows is needed to protect established Nebraska uses, including the Platte River habitat. "Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982); *see also Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931). "At the root of the doctrine is the * * * principle that * * * a State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon and Washington*, 462 U.S. 1017, 1025 (1983). That doctrine "clearly extends" to a case -- such as this -- in which an upstream state proposes "to divert water for future uses." *Colorado v. New Mexico*, 459 U.S. at 190.

The touchstone of equitable apportionment in such cases is the protection of existing equities. *Nebraska v. Wyoming*, 325 U.S. at 618 (aim is always to secure a "just and equitable" apportionment). Under the doctrine, the Court will relax state priority rules to protect *existing* equities based upon junior uses. *See, e.g., Nebraska v. Wyoming*, 325 U.S. at 618 ("[E]stablished uses should be protected though strict application of the priority rule might jeopardize them."); *Colorado v. New Mexico*, 459 U.S. at 186 (senior appropriations must sometimes "yield to the 'countervailing equities' * * * even though * * * based on junior appropriations"). When balancing the benefits of future use against the harms to existing uses, the Court has also

> recognize[d] that the equities supporting the protection of existing economies *will usually be compelling*. The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote.

Colorado v. New Mexico, 459 U.S. at 187 (emphasis added).

Consistent with this principle, the Court has protected wildlife equities which depend upon the existing regimen of an interstate stream. For example, in *New Jersey v. New York*, 283 U.S. 336, 343-45 (1931), the Court considered the effect of diversions in New York on the shad fisheries, oyster industry, and recreational value of the Delaware River and some its tributaries. Finding the effect upon recreation and "the oyster fisheries * * * *to be greater than New Jersey ought to bear*," the Court substantially reduced the diversion permitted by the special master and required New York to "construct[] an efficient plant for the treatment of sewage entering the [river]." *Id.* at 345 (emphasis added); *see also Idaho v. Oregon*, 462 U.S. at 1024 (equitable apportionment doctrine applied to a dispute over anadromous fish); *Connecticut v. Massachusetts*, 282 U.S. 660, 667 (1931) (impact of a proposed diversion on downstream "shad run" considered but no proof of injury found).

Accordingly, the equitable apportionment doctrine requires that this court accept Nebraska's Amended Petition in order to protect Nebraska's endangered wildlife from the proposed Wyoming diversions.

B. The Close Relationship Between Irrigation And Non-Irrigation Season Flows Requires That This Court Exercise Its Original Jurisdiction And Accept Nebraska's Amended Petition

The majority of Nebraska's unprotected equities are located below Kingsley Dam and are met by flows released from McConaughy Reservoir. Approximately 20% of the water supply flowing into McConaughy Reservoir are non-irrigation season flows entering Nebraska from Wyoming. Approximately 40% of the water supply is comprised of return flows, precipitation and tributary flows arising in Nebraska during the non-irrigation season. Only 40% of the annual supply enters the reservoir during the irrigation season. Thus, if the Court addresses only the apportionment of irrigation season flows, without at the same time determining the apportionment of non-irrigation season flows, it leaves unresolved the largest component of the apportionment dispute. To avoid wasting judicial resources on litigation which focuses only on part of the controversy, this Court should allow Nebraska to amend its complaint to consider the apportionment of non-irrigation season flows.

Since the construction of the McConaughy Reservoir, designating portions of the river flow according to the time of year, i.e., "irrigation season flows" versus "non-irrigation season flows," is no longer a meaningful division for apportionment purposes. At the time that Nebraska filed its original petition for an apportionment of irrigation season flows, the McConaughy reservoir had not yet been constructed. When the Court formulated its original decree, the McConaughy Reservoir was just beginning operation. Before the construction of the McConaughy Reservoir, Nebraska had to rely on the natural flow of the river at particular times of the year

to meet the needs of the equities located below Llewellen. For example, during irrigation season, Nebraska would have to rely on irrigation season flows -- that is, the natural flow of water during the season -- for its irrigation needs.

When the States approached the Supreme Court to apportion the river flow, they were primarily concerned with obtaining sufficient water during irrigation season, and less concerned with the apportionment of non-irrigation season flows. In addition, neither the Special Master, Nebraska nor the United States anticipated any threatened diversion of the non-irrigation season flows. Certainly, the states did not consider the non-irrigation uses, such as wildlife, to be unimportant. However, for purposes of simplifying the issues, and because the states were concerned predominately with the irrigation season problem, they did not petition the Court to apportion non-irrigation season flows. Recognizing that factual circumstances with respect to water flow change over time, Special Master Dougherty had the foresight to include a reopener clause in the Decree to allow additional action by the Court should the need arise.

In 1941, Nebraska completed construction of the McConaughy Reservoir, which has a storage capacity of nearly 2 million acre feet of water. Nebraska was now able to store non-irrigation season flows in large quantities for use during the irrigation season, and conversely could also store non-irrigation season flows during irrigation season. With its newfound storage capacity, Nebraska was no longer wholly dependent on the natural flow of the river to meet its seasonal needs downstream of Llewellen, and at this point in the river, the distinction between irrigation season flows and non-irrigation season flows became irrelevant. Thus, after the construction of the reservoir, Nebraska became less concerned with the seasonal flow of the river, and more

concerned with the overall annual flow of water into the State.

Non-irrigation season flows constitute the largest component of the average annual flow into the McConaughy Reservoir. In fact, non-irrigation season flows make up 60% of the total flow into the Reservoir. A significant portion of that non-irrigation season flow (37%) enters by way of the North Platte River from Wyoming to Nebraska and into the Reservoir.

These figures demonstrate the potential harm to Nebraska if Wyoming is left to divert the currently unregulated non-irrigation season flows. If the Court were to decide the apportionment of irrigation season flows alone, the Court would be addressing only part of the problem, leaving the other portion of the problem to be resolved in separate litigation. Requiring Nebraska to litigate this issue separately, and retaining the now obsolete categories of irrigation season flows and non-irrigation season flows is illogical, ignores the true nature of this problem, and would unnecessarily waste judicial resources. It would be far more sensible for this Court to address the true nature of this dispute -- the apportionment of the *annual* water flow from the North Platte River -- than for the Court to continue to recognize artificial seasonal distinctions which are of no practical relevance. Thus, this Court should allow Nebraska to amend its complaint to include the non-irrigation season flows, the portion of annual flow that under the Court's 1945 Decree remains unregulated.

C. To Avoid Irreversible Injury To The Wildlife Habitat The Court Must Exercise Its Original Jurisdiction and Accept Nebraska's Petition

A final Decree that does not include an apportionment for non-irrigation season flows will have a serious adverse effect upon the critical habitat. Important and long-standing uses in Nebraska have come to rely upon non-irrigation season flows. For example, the return of North Platte Project irrigation flows (protected by the Decree) continues well into the non-irrigation season. In fact, such return flows may be released into the river at a steady rate throughout the entire year.

As explained above, one of the world's most important avian habitats depends upon non-irrigation season natural flows. Similarly, agriculture and hydropower production also rely on those flows. These uses in turn support long-established and substantial economies of vital importance to Nebraska. In short, a thriving economy has arisen around the natural resource values of the Central Platte and the lower reaches of the North Platte. These critical equities are to a considerable extent interrelated, and protection of flows required for one will often inure to the benefit of another.

The proposed upstream projects in Wyoming will substantially reduce the natural flow reaching Nebraska during the irrigation and non-irrigation seasons. That depletion of the available sources for instream flows will seriously threaten the Platte River habitat.

Nebraska has identified, through discovery, at least eighteen proposed Wyoming water development projects or actions. *See Nebraska Brief* at 20. Each of these proposed projects would deplete the quantity of non-irrigation season flows reaching Nebraska. Accordingly, in order to develop a comprehensive solution to a comprehensive problem, this Court must exercise its

discretion and accept for filing Nebraska's amended petition.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant Nebraska's motion to amend its petition for an equitable apportionment of non-irrigation season flows of the North Platte River and for the assertion of new claims.

Respectfully submitted,

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